



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Service Technicians, Inc.--Reconsideration

File: B-234587.2

Date: May 16, 1989

DIGEST

Request for reconsideration of a protest that a procurement was improperly set aside under Section 8(a) of the Small Business Act and that the Small Business Administration (SBA) failed to conduct a determination of adverse impact is denied where the initial protest was filed several months after the initial adverse agency action on the protest by the agency offering the requirement and by the SBA.

DECISION

Service Technicians, Inc. (Serv-Tech), requests reconsideration of our February 24, 1989, dismissal of the firm's protest against the decision of the Department of the Navy to award a contract under request for proposals (RFP) No. N62474-88-R-2013 for housing maintenance services at the Murphy Canyon Heights Navy housing area, San Diego, California, to the Small Business Administration (SBA), and the proposed award of a subsequent subcontract to Luis E. Garcia, Inc., pursuant to the Section 8(a) program of the Small Business Act, 15 U.S.C. § 637(a) (1982). We dismissed the protest as premature because Serv-Tech characterized its protest as challenging the "anticipated decision" of the Navy to award a contract to the SBA for subcontracting under the 8(a) program.

We have reopened Serv-Tech's protest that the Navy improperly awarded the Murphy Canyon housing services contract to the SBA for subcontracting under the 8(a) program and that the SBA should have performed an adverse impact analysis on Serv-Tech, based on the protester's representation that it was not aware of its basis for protest until February 15, 1989. On that date, Serv-Tech asserts, as a result of an inquiry to the Navy made by Serv-Tech's Congressman, the firm learned that the Navy had decided to award a contract for the requirement to the SBA for subcontracting to Garcia; Serv-Tech protested to our Office on February 22. From our

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review of the fully developed record, however, it is clear that Serv-Tech's protest is untimely.

Serv-Tech filed a protest with the Navy on August 26, 1988, arguing that Navy's proposed contract with the SBA under the 8(a) program would be improper. Serv-Tech also protested to the SBA on August 26, stating that the SBA had not performed an adverse impact analysis on Serv-Tech, a determination that Serv-Tech asserted is required before award of the contract under the 8(a) program.

The SBA responded to Serv-Tech's agency-level protest on September 9, informing the firm that the Navy had offered the requirement for possible 8(a) contracting. The SBA further stated that SBA regulations provide for a prior review of acceptance of a procurement into the 8(a) program to determine any adverse impact that acceptance might have on small businesses not in the program, but that such a determination is not made when the requirement being considered is new, since, by definition, there would be no incumbent small business contractor on a new requirement. See 13 C.F.R. § 124.301(b)(8). The SBA further advised Serv-Tech that the Navy believed the requirement to be new because of changes being made to the statement of work; that the SBA would rely on the Navy to make the decision as to whether a requirement had been expanded or modified to the point that it might be considered a new requirement; and that the SBA would confirm the determination as to whether or not the requirement is new with the Navy.

The Navy responded to Serv-Tech's agency-level protest on September 15, advising the firm, with respect to its contention that the contract with the SBA under the 8(a) program would be improper, that the Navy was obligated to award a certain percentage of its contracts to small business with a portion going to the 8(a) program, and that it was forwarding Serv-Tech's protest to the SBA for further action.

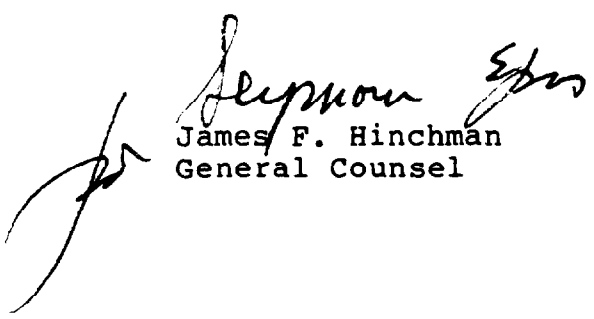
On November 7, the SBA responded to an inquiry from Serv-Tech's Congressman, on behalf of Serv-Tech, stating that the SBA had determined that the requirement offered by the Navy for contracting under the SBA's 8(a) program is a new requirement, and that therefore the SBA is not required to conduct an adverse impact determination on Serv-Tech. The Congressman forwarded SBA's response to Serv-Tech on November 30.

Our Bid Protest Regulations permit a protest to be filed initially with the contracting agency, but require that any subsequent protest to this Office must be filed within

10 working days of when the protester knows or should know of the initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3) (1988); Rocky Mountain Helicopters, Inc.--Request for Reconsideration, B-231898.2, Aug. 22, 1988, 88-2 CPD ¶ 169. The regulations define adverse agency action as any action on the part of the contracting agency which is prejudicial to the position taken in a protest filed with the agency. 4 C.F.R. § 21.0(f).

It is clear from the record that Serv-Tech initially knew of the Navy's intention to offer the requirement to the SBA under the 8(a) program as of September 9, 1988, when the SBA responded to Serv-Tech's protest. That intention was confirmed to the protester when the Navy responded to Serv-Tech's protest on September 15. Moreover, Serv-Tech knew of the SBA's decision not to perform an adverse impact analysis on November 30, when Serv-Tech received SBA's response to its protest on that issue from its Congressman. Once informed of initial adverse agency action, a protester may not delay filing a subsequent protest with our Office until actual award of a contract. Rocky Mountain Helicopters, Inc.--Request for Reconsideration, B-231898.2, supra. Since Serv-Tech knew of the Navy's and the SBA's positions with regard to its bases for protest as of September 9 and 15 and November 30, 1988, it may not now assert that it was not aware of the Navy's "final" decision until February 15, 1989, when it was advised of the Navy's response to an inquiry by Serv-Tech's Congressman. Accordingly, we find Serv-Tech's protest to be untimely, since it was filed more than 10 working days following the initial adverse agency action.

The request for reconsideration is denied.



James F. Hinchman
General Counsel